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No. 71-1062

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

THE PROCTER & GAMBLE COMPANY, *Petitioner,*

v.

THE PUREX CORPORATION, LTD., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 3, 1971, in this action for treble damages under the antitrust laws.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is reported at 308 F. Supp. 584 (C.D. Cal. 1970). The opinion of the United States Court of Appeals for the Ninth Circuit is not yet officially reported. Both opinions are reprinted in the appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether Section 5(a) of the Clayton Act accords prima facie evidentiary effect in a private treble damage action to an administrative determination that has been enforced by a Court of Appeals.

STATUTE INVOLVED

Section 5 of the Clayton Act provides in relevant part:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: . . .
>
> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole

or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: . . . ." 38 Stat. 731 (1914), *as amended and codified*, 15 U.S.C. § 16 (Vol. 3, p. 2984) (1970).

STATEMENT.

The Federal Trade Commission charged and thereafter determined that the acquisition in 1957 of the Clorox Chemical Company (Clorox) by The Procter & Gamble Company (Procter) violated Section 7 of the Clayton Act, 15 U.S.C. § 18 (1970). Upon review of the Commission's determination, which consisted of a prediction as to the competitive impact of the acquisition based exclusively on pre-acquisition evidence, the Court of Appeals for the Sixth Circuit set aside the Commission's order. 358 F.2d 74 (1966). This Court reinstated that order, finding that there was sufficient evidence to support the Commission's finding that the acquisition might affect competition in a manner proscribed by Section 7 of the Clayton Act. 386 U.S. 568 (1967). Upon remand, the Court of Appeals entered a decree affirming and enforcing the Commission order that Procter divest the Clorox business. Procter has since complied with that order.

The instant case is a private action brought under 15 U.S.C. § 15 (1970) by Purex Corporation, Ltd. (Purex) against Procter and Clorox. Purex was at the time of the acquisition and continues to be, next to Clorox, the nation's largest manufacturer of liquid bleach. The complaint alleges that the acquisition of Clorox by Procter and the conduct of the Clorox business during the period of Procter's ownership violated Section 7 of the Clayton Act and Sections 1 and 2 of

the Sherman Act (15 U.S.C. §§ 1, 2), and injured Purex. Treble damages in the amount of $523,500,000 are sought and jury trial is demanded. The complaint alleges that Section 5(a) of the Clayton Act makes the Commission order prima facie evidence in support of the Purex claim for damages.

After answer and before trial, Procter moved for a ruling that the Commission's order is outside the scope of Section 5(a). The District Court denied the motion and held that the order is prima facie evidence in this action, relying primarily upon a decision rendered by the Court of Appeals for the First Circuit while the motion was *sub judice*. *Farmington Dowel Prod. Co.* v. *Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969). Procter sought and obtained interlocutory review under the provision of 28 U.S.C. § 1292(b) (1970). The Court of Appeals for the Ninth Circuit affirmed, not on the ground that the Commission's order was prima facie evidence, as the District Court and the Court of Appeals for the First Circuit had held, but on the ground that the decree of the Sixth Circuit enforcing the Commission's order could be introduced as prima facie evidence under Section 5(a).

REASONS FOR GRANTING THE WRIT

Whether a determination evolved in an administrative proceeding is prima facie evidence in a private treble damage action is a question of great public importance in the enforcement of the antitrust laws. It has not been, but should be, settled by this Court, particularly since it is a question that was considered and explicitly left unsettled in the opinion of this Court in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) (hereafter *3M*).

In *3M* this Court examined both provisions of Section 5: subsection (a) which makes an antitrust judgment in favor of the Government prima facie evidence in a private damage action; and subsection (b) which tolls the statute of limitations for bringing private actions during the pendency of Government proceedings. It held that the institution of an administrative proceeding served to toll the statute of limitations but left open the question whether the outcome of such a proceeding constituted prima facie evidence, pointing out, however, the Congressional purposes and policies that support the negative answer given by the lower federal courts over the years. Both the court below and the Court of Appeals for the First Circuit in *Farmington Dowel* (the only other Court of Appeals that has considered this question since *3M*) repudiated the settled precedent in the lower courts and disregarded the controlling factors in the interpretation of 5(a) that were laid down by this Court in *3M*. Consideration of those factors demonstrates that Congress did not intend, when it enacted Section 5 in 1914, to accord administrative determinations evidentiary weight in private treble damage actions.

1. While 5(a) by its terms makes a judgment in a prior Government case merely prima facie evidence in support of a private claim, experience has shown that informing the jury that the defendant has previously been adjudged to have violated the law has an overwhelming impact. Notwithstanding the defendant's opportunity to rebut, the basic issue of violation is invariably resolved in favor of the private claimant. *See Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629, 633 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); *International Shoe Mach. Corp.* v. *United*

Shoe Mach. Corp., 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963).[1]

Until the decision of this Court in *3M*, the established decisional authority had been that in enacting Section 5 Congress had not accorded administrative actions the unusual evidentiary significance in subsequent private damage actions that it had given to court actions.[2] *Proper* v. *John Bene & Sons*, 295 Fed. 729 (E.D.N.Y. 1923); *Brunswick-Balke-Collender Co.* v. *American B. & B. Corp.*, 150 F.2d 69 (2d Cir.), *cert. denied*, 326 U.S. 757 (1945); *International Tag & Salesbook Co.* v. *American Salesbook Co.*, 6 F.R.D. 45 (S.D.N.Y. 1943); *United States* v. *United Shoe Mach. Corp.*, 89 F. Supp. 349, 356 (D. Mass. 1950); *Wendel Shoes Inc.* v. *Shoeterprise Corp.*, 1958 Trade Cas. ¶ 69,132 (N.Y. Sup. Ct.); *Highland Supply Corp.* v. *Reynolds Metals Co.*, 221 F. Supp. 15 (E.D. Mo. 1963), *rev'd on other grounds but aff'd on issue at bar*, 327 F.2d 725 (8th Cir. 1964), *on remand*, 245 F. Supp. 510 (1965); *see also* Bronstein & Miller, *Regulation of Trade* 1106 (1953); Beer, *Federal Trade Law and Practice* 429 n.53 (1942); 2 Toulmin *Anti-Trust Laws* 118 (1949).

In *3M* this Court did not reject this line of authority. In holding that the institution of an administrative

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[1] That such a result was not unforeseen appears from the floor debates over the Clayton Act, in which some congressmen urged that 5(a) should give "conclusive" rather than "prima facie" effect to prior judgments. Doubt was expressed as to the constitutionality of such a provision but assurances were given that the "prima facie" effect of 5(a) would in fact be conclusive with a jury. 51 Cong. Rec. 16276 (1914) (remarks of Representative Webb, one of the House conferees).

[2] "The prevailing view for many years was that . . . the private litigant could get no evidentiary assistance from the Commission pursuant to section 5(a)." *Farmington Dowel Prod. Co.* v. *Forster Mfg. Co.*, 420 F.2d 61, 67 (1st Cir. 1969).

proceeding tolled the statute of limitations under 5(b), it observed that 5(a) was "governed by different considerations as well as congressional policy objectives." 381 U.S. at 318. These differences are nowhere reflected in the decision of the court below or that of the First Circuit. Nonetheless both courts, by different and somewhat conflicting reasoning, took the broad step which this Court declined to take in *3M*. More than half a century after its enactment, 5(a) is now for the first time being expanded to make prima facie evidence in private damage suits, actions initiated, tried, and resolved by the Federal Trade Commission.[3] In addition, antitrust determinations by the Interstate Commerce Commission, the Federal Reserve Board, the Civil Aeronautics Board, and the Federal Communications Commission will also be entitled for the first time to prima facie evidentiary effect under 5(a).

This expansion of 5(a) is certain to have a substantial impact on the initiation, conduct and resolution of countless private damage actions where there has been a prior administrative determination of an antitrust violation. The treble damage evidentiary implications, if any, of determinations by the Federal Trade Commission and the other important agencies with antitrust enforcement authority should not be left in the present state of confusion. It is of vital public importance that this Court resolve the question that it left open in *3M* and authoritatively determine, as only it can, the scope of 5(a). Sound judicial administra-

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[3] The Commission has broad powers under Section 11 of the Clayton Act, 15 U.S.C. § 21 (1970) to enforce the antitrust laws. In fact, it has become the primary enforcement agency of the Robinson-Patman Act. *Report of the ABA Commission to Study the Federal Trade Commission* 6, 64 (September 15, 1969).

tion calls for such a determination before, rather than after, juries have been instructed in this and many other private treble damage actions. Clearly, "resolution of this basic issue should be made at this stage of the litigation and not postponed until after a trial under the Court of Appeals' decision." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970).

2. The decision of the court below disregards and is contrary to the guidelines for the interpretation of 5(a) that were set out by this Court in *3M*. The Court of Appeals for the Third Circuit had reasoned in *3M* that both 5(a) and 5(b), which had been enacted in 1914 as a single section of the Clayton Act, extended to agency proceedings. 332 F.2d 346 (3rd Cir. 1964). This Court expressly rejected that analysis, pointed out significant differences in language, purpose, and impact between the two sections and concluded that "they are governed by different considerations as well as congressional policy objectives. This makes § 5(b) readily severable from § 5(a)." 381 U.S. at 318.

Acknowledging that "the precise language of § 5(b) does not clearly encompass Commission proceedings" (381 U.S. at 321), the Court nonetheless held it applicable to such proceedings. It did so because it found nothing in the legislative history that appeared to limit application of the tolling provision to judicial proceedings and because the broad purpose of Section 5—aid to private damage litigants—would be furthered by applying it to administrative proceedings. It observed that in the application of the tolling provision it is irrelevant whether the prior proceeding is judicial or administrative. In either case it is the institution of the proceeding that puts the defendant on notice that his conduct has been challenged. It is such notice

rather than the character or outcome of the proceeding that warrants tolling the statute of limitations.

The pervasive implication of *3M* was that 5(a) does not extend to administrative proceedings. The opinion emphasized that the operative scope of 5(a) is more "limited" and less "comprehensive" than that of 5(b), 381 U.S. at 317, 319, that the result reached in the prior proceeding, while unimportant in the application of the tolling provision, is all important in the application of 5(a). Moreover, in enacting 5(a) the Congress was "dealing with the delicate area in which a judgment secured in an action between two parties may be used by a third." 381 U.S. at 317. Finally, there is the matter of legislative history. In *3M* the absence of any evidence that Congress intended to limit the tolling provision to judicial proceedings was crucial if not controlling. As we will show, there is abundant legislative history which demonstrates that Congress did intend to so limit the evidentiary thrust of Section 5.

In its analysis of Section 5, the Court's *3M* opinion closely paralleled the reasoning advanced by the Solicitor General in an *amicus* brief filed at the Court's request. *See* 379 U.S. 877 (1964). It was the position of the Solicitor General that "the considerations bearing upon whether an administrative order should be given the same effect as a court adjudication in subsequent litigation are altogether different from those determining whether the running of the statute of limitations should be tolled:" Brief, at 11. Analysis of these considerations led the Solicitor General to conclude that Congress had probably intended to exclude administrative determinations from 5(a) but, because of the different purpose of 5(b), that section could and

should be construed to include administrative proceedings. *Id.* at 32 n. 8.

Thus the clear teaching of this Court's decision in *3M* is that it is not "the literal wording" of Section 5 "that is controlling," [4] but the purpose and substantive thrust of each of its two quite different subdivisions. Yet the court below decided that 5(a) extends to administrative proceedings without so much as a mention of this Court's decision in *3M* or the "congressional policy objectives" which this Court had stressed as controlling. Instead, it adopted the most literal of interpretations that began and ended with the words "judgment or decree" used in 5(a). Seizing on the circumstances that the Commission's order in this case had been reviewed and affirmed, and finding that the action of the reviewing court was, literally, a "judgment or decree," the court below terminated its inquiry, ignoring this Court's mandate in *3M*, which specified congressional purpose and policy as the controlling factors in the interpretation of 5(a).

3. The relevant legislative history convincingly establishes that Congress intended to limit the evidentiary effect of Section 5 to judicial proceedings. In the Senate debates there was no dissent from Senator Walsh's succinct explanation:

> "The operation of the thing is this: If the United States shall proceed against any organization . . . and eventually, after a judicial proceeding going through all the courts . . . [the resulting] judgment stands and can be availed of by anybody who claims to have been damaged. . . .
>
> * * *

[4] 381 U.S. at 321.

> "[T]he violating corporation has had its day in court. It has had an opportunity to try out before a court, with all the forms of the law, every question involved in the lawsuit." 51 Cong. Rec. 13851 (1914).

Representative Floyd (one of the House conferees) explained the conference bill in terms that unmistakably excluded administrative proceedings from its evidentiary reach:

> "Under Section 5 of the bill any private litigant injured by the unlawful acts of any corporation where the Government of the United States has proceeded against such corporation and obtained a judgment, either in a court of law or equity, is allowed the use of that judgment or decree [in a suit]." 51 Cong. Rec. 16319 (1914).

Throughout the legislative history the view was expressed that it was appropriate to give evidentiary effect to government cases in subsequent private suits because the defendant had already had his "day in court" in the government suit. What congressmen meant in 1914 by "day in court" was made explicit by Senator Reed:

> "What is meant by your day in court? [It is the right of a litigant] *to put in his evidence* and take the judgment of a *court or jury* . . . ." 51 Cong. Rec. 13901 (1914) (emphasis supplied).

There was thus a clearly disclosed congressional intent to limit the evidentiary provision of Section 5 to judicial determinations.[5]

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[5] Nothing in the legislative history provides the slightest support for the view, taken by the court below, that 5(a) was intended to apply to administrative determinations that had been affirmed by a reviewing court.

4. The teaching of the legislative history is confirmed by examination of the policy considerations underlying the evidentiary provision of Section 5, the other controlling factor pointed out by this Court in *3M*. When the outcome of a government antitrust action is the basis for imposing a treble damage penalty in a subsequent private action, the nature of the adjudicatory body that decided against the defendant and the quality of its decision-making cannot be ignored. Because of the significant differences in institutional purpose, structure, and procedure, the quality of adjudication by administrative agencies falls short of judicial decision-making in impartiality, detachment and objectivity. These differences, which explain why Congress would have wished to limit 5(a) to judicial proceedings, were not even considered by the court below.

For example, the court below took no account of the differences between court and agency procedures, *e.g.*, loose evidentiary rules and lack of meaningful discovery,[6] which can significantly affect the integrity of the fact-finding process. It also ignored the important institutional differences between courts and agencies. A court decides controversies on a case-by-case basis on the facts of record. An agency, however, not only decides cases but initiates and prosecutes them as well. This combination of functions creates grave problems of prejudgment. Former FTC Commissioner Philip Elman, who authored the Commission's opinion in this case, has concluded on the basis of his experience that "the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fair-

[6] *See, e.g.*, Harris, *FTC Pretrial Discovery Procedures*, 30 ABA Antitrust Section 136 (1966).

ness."[7] In addition, the fact that agencies must decide controversial issues of regulatory policy which have great economic importance exposes agency members to intense political pressures. These pressures are aggravated by the need for agencies to secure annual appropriations from Congress and the concern of agency members, who do not enjoy life tenure, for reappointment and reconfirmation.[8]

More subtle than the institutional and political pressures upon agencies are the implications of their policy-making roles. They are creatures of Congress with a mission to develop regulatory solutions in given areas of the economy. In fulfilling this mission, administrators inevitably come to regard adjudication as largely a vehicle for initiating or implementing policy rather than as a detached and considered fact-finding inquiry. All of these factors affect the accuracy and reliability of administrative decision-making and set it apart from judicial adjudication.[9]

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[7] Elman, *The Regulatory Process: A Personal View*, 39 ABA Antitrust Section 901, 907 (1970).

[8] *See, e.g.*, Friendly, *The Federal Administrative Agencies* 142 (1962); Landis, *Report on Regulatory Agencies to the President-Elect* 13-15 (1960). FTC decisions have frequently been set aside because the members of the Commission had prejudged the matter or been exposed to improper political pressures. *Cinderella Career and Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970); *American Cyanamid Co.* v. *FTC*, 363 F.2d 757, 763 (6th Cir. 1966); *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966); *Texaco, Inc.* v. *FTC*, 336 F.2d 754 (D.C. Cir. 1964).

[9] The differences between courts and agencies must have appeared especially vivid in 1914 when Section 5(a) was enacted. As the Solicitor General observed in his *3M amicus* brief (p. 34): "... Congress might well have concluded as a matter of substantive policy that it was unwise to give such prima facie effect to an order made without regard to the rules of evidence in the com-

We recognize, of course, that the basic purpose of Section 5 is to aid private suitors. The significant institutional differences, however, between courts and agencies—and the impact of these differences on the quality of adjudication—explain why Congress would nonetheless have limited 5(a) to court adjudications. As this Court stressed in *3M*, and the court below wholly ignored, 5(a) deals with the delicate area in which a judgment secured in an action between two parties may be used by a third. Because the effect on a jury of a prior determination of law violation is for practical purposes close to conclusive, use of an administrative determination in a treble damage action goes far to deprive a defendant of the right to jury trial. *Compare Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959). In light of these problems of unfairness and possible constitutional difficulties[19] (*see Meeker* v. *Lehigh Valley Ry.*, 236 U.S. 412 (1915)) an interpretation of 5(a) to encompass administrative proceedings should not be made in the absence of clear indications that Congress considered and intended such a result.

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paratively free and untried administrative proceedings of the proposed new Federal Trade Commission." As the analysis in the text indicates, the significant institutional differences between courts and agencies have not disappeared.

[19] The unfairness inherent in the decision of the court below is illustrated by current congressional consideration of consumer fraud prevention legislation. An administration bill gives the Department of Justice and the FTC concurrent jurisdiction to prevent unlawful consumer practices, but accords prima facie effect in subsequent private suits only to judgments entered in court actions brought by the Department of Justice. The head of the Department's Antitrust Division, now Judge Richard W. McLaren, testified that to give prima facie effect to FTC orders would cause unfairness to defendants because it would deprive them of jury trial, perhaps unconstitutionally, and of meaningful appellate review. *Hearings Before the Consumer Subcom. of the Sen. Comm. on Commerce*, 92d Cong., 1st Sess. at 49 (1971).

The legislative history is clear that Congress intended no such result in 1914, and in recent years it has consistently refused, despite repeated urging by the FTC, to amend the Clayton Act to include administrative proceedings.[11]

5. The court below found that judicial enforcement of the Commission's order against Procter made wholly unnecessary any inquiry into congressional intent and policy as to the scope of 5(a). It presumably reasoned that court affirmance and enforcement completely judicialized the administrative action. Demonstrably, however, the essential character of administrative action, with all its inherent defects and whatever its advantages, is not so readily transformed. Here, it was the Commission that initiated, prosecuted and decided this matter. It found the facts and determined that its own charges were legally sound. All that the courts did was to exercise the limited judicial review permitted of agency action.[12] Judicial review may weed out some of the more flagrant instances of agency prejudgment or exposure to political pressures, but it cannot erase the fundamental qualitative differences between administrative and judicial fact-finding and decision-making.

Moreover, nothing in the statute itself, its legislative history or in this Court's analysis in *3M* even remotely suggests that Congress intended to distinguish between agency action that had been contested and affirmed and that which had been accepted by the respondent with-

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[11] Federal Trade Commission, *Annual Reports*: 1964: 33-34; 1965: 35-36; 1966: 43-44; 1967: 73-75.

[12] *See Colonial Stores, Inc.* v. *FTC*, 450 F.2d 733 (5th Cir. 1971) for a recital by an experienced appellate court of the substantive limitations on review of Federal Trade Commission action.

out appeal. As the Solicitor General pointed out in his *3M amicus* brief (p. 33), such a distinction leads to a "wholly artificial result."[13] Indeed, it leads to results that are not only artificial but irrational. Evidentiary effect would be denied to administrative orders so clearly correct as not to merit judicial review, but would be accorded to orders of more doubtful validity, as to which review was sought.

In finding and relying on the distinction between reviewed and unreviewed orders the court below also put a price upon court review of administrative action that Congress could never have intended and which may well be unconstitutional. In a cognate situation, this Court made it clear that exercise of the statutory right to review a Trade Commission order should not place a party "in a worse position than one who does not exercise that right." *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 479 (1952). In other areas also it has been made unmistakably clear that the imposition of penalties upon a statutory right to review raises grave constitutional questions. *E.g., United States* v. *Jackson*, 390 U.S. 570 (1968). Surely increased exposure to treble damage liability (in this case the claim is over $500,000,000) is an inordinate price to pay for court review, limited as it is, of the fact findings and regulatory theories advanced by the Commission in this case.

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[13] The reasoning embraced by the court below—that court affirmance brings an administrative order within Section 5(a)—was also employed in the decision of the Court of Appeals in *3M* to support its view that the scope of Sections 5(a) and 5(b) is co-extensive and that both apply to administrative actions. *See* 332 F.2d at 358. That reasoning was not adopted by this Court in its *3M* decision, and the Solicitor General in his *3M amicus* brief (p. 33) noted that: "There are grave difficulties . . . with the [Court of Appeals] ruling that a Federal Trade Commission order became a final judgment or decree when carried to the court of appeals . . . but not otherwise—a wholly artificial result . . . ."

Both the court below and the Court of Appeals for the First Circuit in *Farmington Dowel* looked to considerations other than the congressional purpose and policy in enacting 5(a) in an effort to avoid the hard questions raised by this Court's decision in *3M*. The latter, conceding that in all probability Congress in 1914 had not intended to accord Commission actions prima facie effect in private damage suits, concluded that it had done so by the Finality Act of 1959.[14] That act, however, had a limited purpose—to simplify enforcement of FTC orders—and there is no basis in its language or legislative history for holding that it was intended to affect in any respect the conduct of private treble damage actions.[15] The court below, in a comparable diversion, professed to find a solution in Section 11 of the Clayton Act, which refers in passing to the "judgment" of the Court of Appeals in enforcing an administrative order.[16] But, like the Finality Act, Section 11 was never intended to have anything to do

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[14] Pub. L. 86-107, 73 Stat. 243, *codified at* 15 U.S.C. § 21 (1970).

[15] As the Solicitor General pointed out in his *3M amicus* brief (pp. 33-34): "There are grave difficulties . . . with ascribing to the Finality Act an intention to convert a Commission order into a 'judgment or decree' for the purposes of Section 5(a)—a consequence never suggested during consideration of the Finality Act." Moreover, the Finality Act does not apply to the FTC order involved in this case, inasmuch as it resulted from a proceeding commenced before 1959, the effective date of that Act. *See FTC v. Jantzen, Inc.*, 386 U.S. 228 (1967).

[16] In the portion of Section 11 that provides for court review of an order of the Commission, there appears the following: "No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts." 38 Stat. 736 (1914). The section providing for an enforcement proceeding by the Commission provides that "the judgment and decree of the court shall be final . . . ." 38 Stat. 735 (1914).

with the conduct of private damage actions; it deals solely with procedures for court review of administrative orders. In the *3M amicus* brief (pp. 33-35) the Solicitor General rejected both the approach taken by the court below and that taken in *Farmington Dowel*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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